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File No.: 297298.00001

Crawford Smith
Torys Law Firm LLP
79 Wellington Street West, 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2

Dear Mr. Smith:

**Re: Natural Resource Gas Limited (“NRG”) and Union Gas Limited (“Union”)
– Arbitration and Application by Union to the Ontario Energy Board (“OEB”)**

Arbitration

Thank you for your letter of April 21, 2014. We disagree on the jurisdiction of the arbitration tribunal and that of the OEB. The jurisdiction of the arbitration tribunal cannot be determined either by the OEB or by the Ontario Superior Court of Justice. It can only be determined by the arbitrators themselves.

Under section 10(1)(b) of the *Arbitration Act, 1991*, the Court may appoint the Arbitration Tribunal on a party’s application if “... a person with power to appoint the arbitral tribunal has not done so after a party has given the person seven (7) days notice to do so”.

NRG appointed Mr. William G. Horton as arbitrator on April 11, 2014. Seven days has now expired. In light of the Union *ex parte* application which has sought to reduce the Supplementary Inventory, Unauthorized Overrun Gas and Banked Gas Account Charges (the “Charges”) (as described below) from \$78.31/GJ to \$50.50/GJ, NRG is of the view that the OEB should first deal with the Charges before the arbitration proceeds.

NRG will therefore withhold its application to appoint the second arbitrator until after the Board has made its decision on the appropriate amount of the Charge. In doing this, NRG wishes to respect the fact that NRG has asked the Board to deal with the quantum of the Charge in its QRAM application and that Union has asked the OEB to deal with the quantum of the Charge in its *ex parte* application. Both sides having invoked the



jurisdiction of the Board regarding the amount of the Charge, it is important that we respect the Board's process.

After the Board's decision regarding the amount of the Charge has been made final, Union will consider the necessity of the arbitration.

Union Application to Reduce Certain Charges

NRG was surprised to learn that Union has applied *ex parte* to the OEB to change the amount of the Charges. We have received a copy of Union's letter dated April 3, 2014 requesting the OEB reduce the Charges from \$78.73/GJ to \$50.50/GJ.

Union took the position that the reduced Charge met all of Union's objectives, including financial incentive to customers to adhere to the contract terms and protection of Union's system. Union specifically asked that the changes be applicable to Bundled T-Service Customers (NRG). Union stated that these changes were to apply to February and March 2014 contractual balancing obligations. Union informed the Board that, if the changes were made to the quantum of the Charges by the OEB, Union would be able to rebill all affected customers within a week after the final decision of the Board.

By letter dated April 9, 2014, the OEB required Union to answer certain questions in writing. Union's answers provided to the OEB in Union's letter of April 10, 2014 make admissions. Additionally, in its responses to the OEB, Union argued that its application was being made properly under section 21(4)(b) of the *Ontario Energy Board Act, 1998*. That section of the Act allows that the Board may dispose of a proceeding without a hearing if the Board determines that no person "... will be adversely affected in a material way by the outcome of the proceeding ...".

Union made the admission that the reason for the proposed change from \$78.73/GJ to \$50.50/GJ was "... in recognition of the exceptional weather conditions in 2014 ...". Union also admitted the change was being made "... despite the fact that over 95% of Union's customers met their contractual obligations".

By letter dated April 22, 2014, the Board required additional information of Union to assist the OEB in determining whether it would consider Union's request to make a decision reducing the amount of the Charges without a hearing.

NRG takes the position that the Board should not grant Union's request to proceed without a hearing for the reasons set out in this letter.

It is NRG's strong position that Union cannot fairly and accurately say to the Board that "... no person will be adversely affected in a material way by the outcome of the Board



proceeding". Plainly, NRG will be directly and adversely affected by a decision of the Board to change the Charges from \$78.73/GJ to \$50.50/GJ as NRG is seeking to reduce the Charges to \$12.31/GJ. This request to reduce the Charges to \$12.31/GJ was made to the Board in NRG's QRAM application on notice to Union. NRG repeats this request in Union's *ex parte* application to the Board.

It is my view that Union's application to change the Charges can only be made on notice to NRG (and possibly others) and requires a hearing. Through this letter (which we will send to the OEB), NRG is requesting that the Charges be reduced to Union's actual costs of gas used for balancing which NRG understands to be \$12.31/GJ.

As you know, the \$12.31/GJ is the same Charge requested in the arbitration. The OEB has different powers and authority than does the arbitral tribunal. NRG does not contest the jurisdiction of the OEB to deal with the Charges. Indeed, it has invoked the jurisdiction of the Board to reduce the Charges. But that is not the issue before the arbitration tribunal. The issue before the arbitration tribunal is whether the \$78.87/GJ is a penalty clause at law and therefore unenforceable, being a Charge obtained through the inequality of bargaining power, in highly unique circumstances which leads to a substantial unfairness and inequitable result to NRG.

As set out above, NRG will not proceed with the arbitration until after the OEB has dealt with the outstanding requests to change the amount of the Charge. There is a possibility the arbitration will be unnecessary.

Union has added some salt to the wound created by the \$78.87/GJ Charge by sending NRG a second account requesting the payment on the basis of a \$78.87/GJ Charge. Union imposed a substantial late penalty charge on the full amount Union says is owing by NRG. The late penalty charge is inappropriate in the circumstances. NRG will request that this late penalty charge be declared unenforceable.

Conclusion

NRG therefore takes the position that the arbitration should not proceed at this time pending the decision of the OEB. The OEB itself cannot deal with the jurisdiction of the arbitration tribunal.

NRG requests the Board hold a full public hearing on notice to NRG dealing with the Charges issue as requested by Union, permitting NRG to make its submissions that the Charges should be fixed at Union's cost plus a reasonable mark-up, being \$12.31/GJ.

Yours very truly,



John A. Champion

JAC/car

cc: Kirsten Walli, Ontario Energy Board